STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

ALBIA EDUCATION ASSOCIATION, Complainant, and ALBIA COMMUNITY SCHOOL DISTRICT, Respondent.	)	CASE NO. 4176
ALBIA EDUCATION ASSOCIATION, Complainant, and ALBIA COMMUNITY SCHOOL DISTRICT, Respondent.	)	CASE NO. 4193

DECISION ON APPEAL

This matter is before us on Complainant's appeal from a proposed decision and order issued by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB) on March 11, 1991, which dealt with issues which arose during the impasse-resolution process which culminated with an arbitration award establishing terms of the parties' 1990-91 collective bargaining agreement.

The complaint in Case No. 4176 alleges that the Respondent violated PERB subrule 7.4(3), 621 Iowa Admin. Code 7.4(3), and Iowa Code §§20.10(1), 20.10(2)(e) and 20.10(2)(g) in connection with its submission of a reduction in force (RIF) proposal at the fact-finding stage. Complainant maintains that Respondent's RIF proposal was illegally presented at fact-finding because it was never offered to Complainant during the course of the parties'

negotiations, as required by PERB rule. Complainant argues that if Respondent's RIF proposal was ever offered, such offer could only have been made during mediation, which it insists is a procedure outside the course of negotiations.

Although Complainant prevailed on the merits of the RIF issue at fact-finding, Respondent rejected the fact finder's recommendation and the parties proceeded to arbitration, where the arbitrator directed that the challenged RIF proposal of Respondent be incorporated as part of the parties' collective bargaining agreement. The complaint in Case No. 4193, filed after the parties' exchange of final offers for arbitration but prior to the arbitration hearing itself, alleges Respondent's violation of subrule 7.5(4) and §§20.10(1) and 20.10(2)(e) in connection with its submission of the RIF proposal for arbitration. As in Case No. 4176, Complainant argues that the proposal was never offered to it during the course of the parties' negotiations. The complaints were consolidated for hearing pursuant to subrule 2.16.

Following a hearing on the consolidated complaints, the ALJ concluded that although Complainant had established a subrule 7.4(3) violation by Respondent (the failure to provide Complainant with a copy of the RIF proposal at the parties' fact-finding exchange), the rule violation did not, under the circumstances, rise to the level of a prohibited practice, and that Complainant had failed to establish any other violation of the Act. The ALJ proposed dismissal of both complaints.

Complainant timely appealed the proposed decision and order pursuant to PERB rules, alleging that the proposed decision was contrary to law; that the facts found by the ALJ did not support the proposed decision; that the proposed decision was not supported by a preponderance of the evidence on the record considered as a whole; that the ALJ's ruling resulted in prejudicial error; that a substantial question of law and policy was raised due to absence of or departure from officially reported board precedent by the ALJ, and that there are compelling reasons for reconsideration of an important board rule or policy.

Pursuant to subrule 9.2(3), we have heard the case upon the record submitted before the ALJ. Oral arguments to the board were heard on June 28, 1991. Both parties were represented by counsel: Gerald L. Hammond for Complainant and Peter L.J. Pashler for Respondent. The parties filed briefs in support of their respective positions on appeal.

Pursuant to Iowa Code §17A.15(3), in this appeal we possess all powers which we would have possessed had we elected, pursuant to PERB rule 2.1, to preside at the evidentiary hearing in the place of the ALJ.

Based upon our review of the record before the ALJ, and having considered the parties' briefs and oral arguments, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in his proposed decision and order, are fully supported by the record. We hereby

adopt the ALJ's factual findings as our own and they are, by this reference, incorporated herein and made a part hereof as though fully set forth.

CONCLUSIONS OF LAW

The ALJ's conclusions of law, as set forth in his proposed decision and order, are correct. We hereby adopt the ALJ's conclusions of law as our own and they are, by this reference, incorporated herein and made a part hereof as though fully set forth.

In view of our adoption of the ALJ's findings and conclusions, it follows that we concur in the result reached by the ALJ.

IT IS THEREFORE ORDERED that the complaints filed by the Albia Education Association be and are hereby DISMISSED.

DATED at Des Moines, Iowa, this 1st day of November, 1991.

PUBLIC EMPLOYMENT RELATIONS BOARD

Richard R. Ramsey

RICHARD R. RAMSEY, CHAIRMAN

M. Sue Warner

M. SUE WARNER, BOARD MEMBER

DAVE KNOCK, BOARD MEMBER

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PROPOSED DECISION AND ORDER

Jan V. Berry, Administrative Law Judge. The Albia Education Association (the Association) has filed two related prohibited practice complaints against the Albia Community School District (the District) pursuant to §11 of the Public Employment Relations Act (the Act), chapter 20, Code of Iowa (1989).

The first complaint, Case No. 4176, addresses actions of the District associated with the fact-finding stage of impasse procedures designed to culminate in a 1990-91 collective bargaining agreement between the parties, and alleges the District's violation of PERB subrule 7.4(3) and of §§20.10(1), 20.10(2)(e) and 20.10(2)(g).[1] The second complaint, as amended (Case No. 4193), alleges the District's violation of PERB subrule 7.5(4) and of §§20.10(1) and 20.10(2)(e) in connection with the making of the

[1]All statutory citations, unless otherwise indicated, are to the Code of Iowa (1989).

District's final offer for arbitration of the 1990-91 collective bargaining agreement.

Both complaints were consolidated for hearing pursuant to PERB rule 2.16, 621 Ia.Admin.Code 2.16(20), which was held before me in Albia, Iowa, on October 11, 1990. At hearing each party was represented by counsel, Gerald L. Hammond for the Association and Peter L.J. Pashler for the District.

Following the presentation of evidence on October 11, 1990, and upon agreement of the parties, the conclusion of the hearing was continued pending the disposition of a then-pending motion of the Association to quash certain subpoenas which had been issued upon the request of the District. That motion was subsequently withdrawn by the Association and the record was completed by the parties' filing of an evidentiary stipulation on December 11, 1990.

Both parties have been afforded full opportunity to present evidence and arguments in support of their respective positions, and both have filed briefs. Based upon the entirety of the record before me, and having considered the briefs and arguments of each party, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Association is an employee organization within the meaning of §20.3(4) and the District is a public employer within the meaning of §20.3(1). The Association has been certified by the Public Employment Relations Board (PERB) as the exclusive bargaining representative for all professional non-supervisory

employees of the District and was a party to a collective bargaining agreement with the District effective from July 1, 1989 through June 30, 1990. That contract contained a provision concerning the mandatory bargaining topic of staff reduction.

During the latter part of 1989 the parties commenced activities which were intended to ultimately result in a successor contract to be effective for 1990-91. Pursuant to §20.17(3), the Association presented its initial bargaining position to the District on October 9, 1989. As to the matter of staff reduction, the Association proposed certain changes in the existing contract language.[2]

On October 17, 1989, the District presented the Association with its initial bargaining position as required by §20.17(3). The District, unsatisfied with the current contract's reduction in force (RIF) language, proposed changes which were different than those previously proposed by the Association.[3]

The parties' positions having been framed by their respective initial offers, a negotiating session was held on October 26, 1989.

The Association had by this time examined the District's initial RIF proposal. Its chief negotiator, Richard James (James), testified that the lack of a "bumping" procedure in the District's offer was a concern of the Association and that this concern was conveyed to the District's superintendent, Steven Wehr (Wehr), who was serving as the head of the District's bargaining team.

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[2]See Association Exhibit 1.

[3]See Association Exhibit 2.

During the October 26, 1989 negotiation session, the Association presented a counter-proposal to the District's initial RIF offer. The Association's counter adopted a portion of the District's initial proposal, but simply reiterated the remainder of the Association's initial offer on the subject.[4] There was no change in the District's RIF position on October 26, 1989.

The parties' next bargaining session took place on November 21, 1989. That session was limited, however, to issues unrelated to the subject of reduction in force.

James and Robert Putnam (Putnam), the Association's "contract maintenance chairman", testified that throughout the course of the Association's discussions with the District, the District had adhered to a "total package" bargaining concept, i.e., had refused to tentatively agree (TA) to any agreed-upon item standing alone, insisting that a total contract would be the only thing the District would TA.

In response to the Association's expressed concern that the District's initial RIF proposal contained no "bumping" procedure for laid off unit members, and also in order to correct what he perceived to have been an omission from the District's initial RIF proposal, Wehr prepared new RIF language, which was admitted at hearing as Association Exhibit 3.

Although the record does not reflect which party requested the service, mediation pursuant to §20.20 was subsequently conducted. As to that mediation, the parties have stipulated:

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[4]See District Exhibit 3.

1. Mediation between parties occurred on December 7, 1989 conducted by David Knock, mediator appointed by the Iowa PERB.

2. At the commencement of mediation while in joint session David Knock asked the parties their respective positions regarding each of their unresolved issues. The District, by and through its negotiator Superintendent Steve Wehr, gave the Association and the mediator a copy of new language the District proposed for staff reduction (exhibit Assoc. 3).

3. In the course of mediation on December 7, 1989 the negotiators for the Association considered the unresolved item of staff reduction (Association Exhibit 3).

Wehr testified, and I find, that during the joint meeting at the commencement of the mediation session, and contemporaneously with its delivery of a copy of Association Exhibit 3, the District also gave the Association a copy of District Exhibit 2, which was a synopsis of the District's perception of the parties' positions on the items then at impasse. As to the RIF issue, District Exhibit 2 simply stated "New Language" as each party's position.

It is undisputed that the Association first saw the District's new RIF language (Association Exhibit 3) at the December 7, 1989 mediation. Both James and Putnam testified that the new language was presented as a "supposal" to change the language of the then-effective collective bargaining agreement. Although there is nothing in the record which indicates that the District characterized its new language as such, James and Putnam apparently concluded that it was a "supposal" due to the total-package bargaining strategy the District had employed to that point. Although the basis for his belief was not made of record, James testified that it was the Association's understanding that

everything presented by the District during this mediation was a supposal, and that although the Association was open to proposals, the District did not present it with any.

The term "supposal" is not defined in either the Act or in PERB's rules. James and Putnam, however, explained their own definition of the term: "That supposal to us is something that is agreed upon if everything else is agreed upon. It's not a proposal on its face that could be agreed upon or altered by itself";[5] "Supposal is something that we can't agree upon on its face without -- in this case the total package. Whereas a proposal, we can go back in and alter it with counters and so forth";[6] "A supposal is -- the way that these negotiations have been going, nothing would be added other than a total package";[7] and "A supposal is a package that if it is accepted, it will go into the contract. If it is not accepted, it's gone. Total package, you buy the whole thing or you don't get any . . . . For a supposal now, you can have a supposal on one item that they want, have a supposal on one item, okay? It's not a proposal. . . . If we have a supposal and it was accepted, okay, we could work on that, could be accepted as a

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[5]James at Tr p. 19.

[6]James at Tr pp. 35-36. Interestingly, despite the "no alternations, no counters" aspect of a "supposal" as defined by James, he later testified that after receiving the "supposal" from the District at the December 7, 1989 mediation, the Association "penciled in some changes to that supposal, and the mediator said that he would take them to the Board. . . . He took that to them, came back a short while later and said, `No way,' and that was essentially the end of that." Tr at p. 73.

[7]James at Tr p. 72.

single item. As a supposal, usually it's tied to a whole package. The whole package is a supposal. And if you buy the whole thing, you buy the whole thing. If you don't, you -- it's gone. You never see it again."[8]

Although the District's new RIF language had been given to the Association in joint session in response to the mediator's inquiry about the parties' current positions on the unresolved issues, Wehr testified that he also advised the mediator that the mediator could relay the proposed language to the Association as a stand-alone offer (i.e., as an offer not contingent upon the Association's acceptance of any "package").

According to Putnam, the mediator at the December 7, 1989 session told the Association it needed to make some movement in its present position. He testified that when the mediator was with the District's bargaining team, he and another member of the Association team sat down with the District's RIF "supposal" to construct a "supposal" of their own.

Putnam and the other team member, using the District's new RIF language as a starting point, then produced a document which was admitted at hearing as Association Exhibit 9. According to Putnam, this Association effort was not presented to the District during the December 7 mediation due to the District's unwillingness to make any movement on unresolved economic issues.

At some time following mediation, Wehr and Putnam were talking informally when Wehr expressed optimism that a settlement of all

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[8]Putnam at Tr pp. 95-96.

issues could be accomplished. Putnam advised him that the Association had, during mediation, been working on its own RIF language, that it was not too different than the District's language, and that he could probably supply Wehr with a copy of it. Subsequently, on December 9 or 10, 1989, Putnam provided Wehr with a copy of Association Exhibit 9, told him it was what the Association was working on and chided him that it had been the District which had been reluctant to show movement in its position on unresolved issues.

On January 17, 1990, a brief negotiation session took place. The Association apparently made some counter-proposals to the District on unspecified issues, but received no written proposals from the District in return.

A second mediation was conducted at PERB's Des Moines offices on February 1, 1990. According to James, the ground rules for the mediation were "[t]hat the -- anything presented to us or brought back to us was a supposal. And we also made it clear at that time that that's -- that was the Association's wishes as well . . . . But everything we presented at that time was a supposal."[9]

As to this second mediation, the parties have stipulated as follows:

> 1. Mediation between the parties occurred on February 1, 1990 conducted in part by Charles Boldt, mediator appointed by the Iowa PERB.
> 2. At the commencement of mediation while in joint session Charlie Boldt asked the parties their respective position regarding each of their unresolved issues. The District, by and through its negotiator Superintendent

[9]Tr at p. 22.

Steve Wehr, gave the Association a copy of the language the District proposed for staff reduction (exhibit Assoc. 3).

3. In the course of mediation on February 1, 1990 the negotiators for the Association countered the unresolved item of staff reduction (Association Exhibit 3) with current contract language.

According to Wehr, the District's posture during this second mediation was that Association Exhibit 3 was an offer to the Association by the District on the unresolved RIF issue, and that this was communicated to the Association at the table and again through the mediator, who was asked to take the District's RIF language to the Association as an offer.

The February 1, 1990 mediation did not result in resolution of the parties' impasse. The next morning the Association delivered to the District the Association's fact-finding proposal within the meaning of PERB rule 7.4(3). That afternoon James went to the District's central office to receive the District's fact-finding proposal.

The District's fact-finding proposal was admitted at hearing as Association Exhibit 4. It states the District's proposal on the reduction in force issue simply as "Improve the staff reduction article." The one-page document was accompanied by no attachments, nor were any other documents specifically incorporated therein by reference.

The testimony concerning what transpired upon the delivery of the District's fact-finding proposal is in irreconcilable conflict. According to James, who was the only Association representative then present, the only discussion which took place at that time

dealt with another impasse item and no reference whatsoever was made by Wehr which pertained to the District's RIF position. Putnam testified that James subsequently brought the District's fact-finding proposal to him and that upon examining it he asked James what the "improve the staff reduction article" language meant, but that James responded that he didn't know and hadn't asked. Both Putnam and James denied any knowledge about what "improve the staff reduction article" meant, although James testified that if it meant anything, it must have meant the District's original proposal "since everything else throughout had been supposals."[10]

Wehr, on the other hand, testified that when he gave James the District's fact-finding proposal James asked what the "improve the staff reduction article" language meant, and that he responded that it meant the same thing that the District had had on the table since December -- Association Exhibit 3.

The parties proceeded to fact-finding pursuant to §20.21 on February 9, 1990. It appears that during the proceeding, when the District presented its proposed RIF language, the Association announced its belief that the District's RIF proposal was in violation of PERB rule and that it would file a prohibited practice complaint to establish the proposal's illegality. On February 20, 1990, the Association's complaint in Case No. 4176 was filed with PERB.

On February 22, 1990, fact finder Nancy D. Powers issued her

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[10]Tr at p. 86.

recommendations for settlement of the impasse, recommending, inter alia, that no change in the existing contract's RIF language take place.

On February 28, 1990, Wehr wrote to PERB Chairman Richard R. Ramsey, advising that the District had "rejected the fact-finding decision" and requesting PERB's issuance of a list of interest arbitrators.[11]

On March 3, 1990, Wehr again wrote to Chairman Ramsey, this time in answer to the Association's prohibited practice complaint. Wehr denied that subrule 7.4(3) had been violated and denied that the District had committed any violation of the Act as alleged by the Association. Wehr also advised that the District had rejected the fact finder's recommendations, that it intended to pursue the RIF issue to arbitration and that the District's position would remain the same.

An arbitrator was selected by the parties and arbitration pursuant to §20.22 was scheduled for March 23, 1990.

Although the record does not reflect the dates of the filing or service, the parties apparently did file and serve their final offers for arbitration pursuant to PERB subrule 7.5(4). The District's final offer, admitted as Association Exhibit 8, indicated its stance that new staff reduction language should be incorporated into the parties' collective bargaining agreement "according to the attached page". Attached to the document was a copy of Association Exhibit 3, the same language the District had

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[11]See District Exhibit 6.

provided to the Association at both mediations and had proposed at fact-finding.

On March 20, 1990, the Association filed its complaint in Case No. 4193.

The arbitration hearing was conducted on March 23 in Albia. The District urged the adoption of its new RIF language while the Association supported an award of the fact finder's recommendation. On April 5, 1990, Arbitrator Neil M. Gundermann issued his award. On the staff reduction issue he directed that the District's proposed language be incorporated into the parties' 1990-91 collective bargaining agreement.

CONCLUSIONS OF LAW

The portions of the Act alleged to have been violated by the District provide:

> 20.10 Prohibited practices.
> 1. It shall be a prohibited practice for any public employer, public employee or employee organization to willfully refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.
> 2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:
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> . . .
>
> *e*. Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.
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> . . .
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> *g*. Refuse to participate in good faith in any agreed upon impasse procedures or those set forth in this chapter.

The Association maintains that the District's fact-finding position on the RIF issue, which was also its final offer for arbitration, was never offered to the Association in the course of the parties' negotiations. Since PERB subrule 7.4(3) prohibits any

party from presenting a fact-finding proposal which has not been so offered, the Association reasons that the District's fact-finding proposal was illegal and that its presentation constitutes a prohibited practice. Similarly, since subrule 7.5(4)(a) prohibits the submission of a final offer for arbitration which has not been offered to the other party during the course of negotiations, the Association maintains that the District committed another prohibited practice by its presentation of what the Association would characterize as an illegal offer for arbitration.

The Association's basic legal theory is unquestionably sound. PERB has consistently held that a party violates its duty to bargain and engage in impasse procedures in good faith, and thus commits a prohibited practice, when it submits a proposal for fact-finding that has not been offered to the other party during the course of negotiations,[12] and has reached the same result in the context of arbitration.[13]

The Association's case is based upon two alternative premises: first, that the language which the District carried into fact-finding and arbitration as its position was never offered to the Association, and second, that even if it was offered to the Association, the offer was not made "in the course of negotiations"

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[12]See, e.g., Earlham Community School District, 77 PERB 1048; Ames Community School District, 78 PERB 1212; Ottumwa Community School District, 82 PERB 2140.

[13]Everly Community School District, 83 PERB 2444.

as is required by subrules 7.4(3) and 7.5(4)(a).[14]

The Association bears the burden of proving that a prohibited practice has occurred. In order to prevail upon its stated theory, it must establish that the District's fact-finding position and final offer for arbitration were never offered to it in the course of negotiations.

I. *Has the Association established that the District's RIF language was never offered?*

It is uncontroverted that the RIF language which the District relied upon at fact-finding and at arbitration was not offered (proposed) to the Association during either of the initial public bargaining sessions (October 9 and October 17, 1989). Nor was the language offered at the October 26, 1989, November 21, 1989 or January 17, 1990 sessions. Further, there is no evidence that it

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[14]Those subrules provide:

7.4(3) *Notice of hearing and exchange of proposal.* The appointment of the fact finder shall be effective the date of the commencement of the fact-finding hearing. The board or fact finder shall establish the time, place and date of hearing and shall notify the parties of the same. The parties shall exchange copies of all proposals to be presented to the fact finder at least five (5) days prior to the commencement of the fact-finding hearing; provided, however, that the parties may continue to bargain and nothing in this section shall preclude a party from making a concession or amending its proposals in the course of further bargaining. No party shall present a proposal to the fact finder which has not been offered to the other party in the course of negotiations.

7.5(4) *Preliminary information.* Within four (4) days of the filing of the request with the board for arbitration, each party shall submit to the board the following information:

a. Final offers shall not be amended. A party shall not submit an offer for arbitration which has not been offered to the other party in the course of negotiations.

was offered by the District during the conversations between Putnam and Wehr which took place on December 9 or 10, 1989. There is no claim that an offer of the language occurred at the time Wehr delivered the District's fact-finding proposal to James on February 2, 1990. Consequently, if the language was offered to the Association at all before fact-finding, such offer must have taken place at one of the mediation sessions.

My review of the record leads me to conclude that the Association has failed to establish that the District's revised RIF language was not offered to the Association at the December 7, 1989 mediation. Consequently, I need not consider whether the language was also offered at some later date.

It has been stipulated that at the commencement of the mediation, with both sides present, the mediator asked each of the parties their respective positions on each of the unresolved issues. Reduction in force was one of those issues. When asked for the District's RIF position, Wehr "gave the Association and the mediator a copy of new language the District proposed for staff reduction (exhibit Assoc. 3)." (Emphasis added.)[15] I can locate nothing in the record which establishes that the delivery of the District's RIF language, albeit previously unseen by the Association, was limited by either the District or the mediator in such a way that it should not be considered to have been an offer/proposal.

The Association, although acknowledging its receipt of the

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[15]See parties' stipulation at p. 5, supra.

language at that time, steadfastly maintains that it was not a proposal or offer, but was instead something less -- a "supposal".

The record contains no evidence that the word "supposal" ever emerged, at any time, from the mouth or the pen of any representative of the District. Instead, it appears that the Association simply construed all District overtures as "supposals" due to the total-package bargaining strategy the District had employed up to that point. Although their various definitions of the term are at least somewhat inconsistent, James and Putnam apparently adhered to a belief that all "package" overtures by a bargaining party, the acceptance of any part of which is contingent upon the acceptance of the whole, are of necessity "supposals". Since the District had been resisting anything but a total package TA up to that point, and since the Association apparently assumed that the District was continuing that strategy, it construed everything received from the District as a "supposal".

I believe there are two major problems with this position. First, I cannot subscribe to the Association's apparent position that any "package" overture cannot, by definition, constitute an "offer" or "proposal". While the term "supposal" is unquestionably used by mediators and parties, I can find no support for the definitions ascribed to the word by the Association, nor has the Association cited any. Second, although mediators or parties certainly could agree upon ground rules at mediation which might prevent communications which would otherwise clearly constitute offers from being held to be such, there is no evidence that ground

rules with this effect were in place at the December 7, 1989 mediation.[16]

Although I suspect that the record before me does not reflect the entirety of what transpired at the December 7 mediation, and although I find it difficult to believe that no discussion among those present ensued when the District's never-before-seen RIF language was produced and delivered in response to the mediator's inquiry, the stipulation which the parties have entered paints a simple and unambiguous picture: the mediator asked the District what its RIF position was and the District produced and delivered the disputed language without condition or comment. I cannot conclude that such a transaction was anything less than an offer of the language to the Association.

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[16]Although the Association maintains that the December 7, 1989 mediation was conducted on the premise that no individual topic could be agreed to without agreement upon an entire contract, and that the "everything from both parties is a supposal" ground rule which apparently applied at the February 1, 1990 mediation was also in effect on December 7, I can find no probative support for those propositions in the record itself. While both James and Putnam repeatedly insisted that everything received from the District on December 7, 1989, was a "supposal", the record supports only a finding that this is the characterization which the Association put on all overtures, not one which was imposed by the District or the mediator. There is no evidence which establishes that the District's position at the commencement of the December 7, 1989 mediation was the "all or nothing" stance which the Association ascribes to it, or that the apparently unambiguous statement of the District's positions in the joint session were, in fact, anything less than proposals.

Consequently, although James and Putnam insist that everything from the District on December 7, 1989, was a "supposal", I can find no sound basis for this conclusion on their part in the record. Their unsupported belief as to the character of District overtures during the joint session cannot transform what appears to have been an unambiguous and unqualified proposal on RIF into something less than what it was.

Consequently, I conclude that the Association has failed to carry its burden of proving that the District's RIF proposal at fact-finding and arbitration had not been offered to the Association prior to the parties' exchange of fact-finding positions.

II. *Was the offer of the District's RIF language during mediation made "in the course of negotiations"?*

PERB's rules prohibit the presentation of proposals to fact finders or interest arbitrators unless those proposals have been offered to the other party in the course of negotiations.[17] Having concluded that the Association has failed to show that the District's RIF language was not offered at the December 7, 1989 mediation, the question remains whether an offer made during mediation is "in the course of negotiations" within the meaning of the applicable rules.

The Association, relying upon the §20.3(10) definition of "impasse" and the §20.3(8) definition of "mediation", argues that offers made by parties during mediation cannot, as a matter of law, be considered to have been made during "the course of negotiations".

As noted by the Association, §20.3(10) defines "impasse" as "the failure of a public employer and the employee organization to reach agreement in the course of negotiations" and §20.3(8) defines "mediation" as "assistance by an impartial third party to reconcile an impasse between the public employer and the employee

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[17]See subrules 7.4(3) and 7.5(4)(a) at footnote 14, supra.

organization through interpretation, suggestion and advice."

The Association argues that, by definition, an impasse must exist before mediation occurs. From that point the Association reasons that the course of negotiations ends where impasse begins. Consequently, according to the Association, mediation (an attempt to reconcile an existing impasse) is outside the course of negotiations since it only occurs after an impasse has been reached.

I cannot agree that the course of negotiations necessarily ends when an impasse is reached. Subrule 7.4(3) itself contemplates that the course of negotiations may continue beyond even the exchange of fact-finding proposals, a point long after impasse has been reached. That subrule provides, in relevant part, that "[t]he parties shall exchange copies of all proposals to be presented to the fact finder at least five (5) days prior to the commencement of the fact-finding hearing; provided, however, that the parties may continue to bargain and nothing in this section shall preclude a party from making a concession or amending its proposals in the course of further bargaining." (Emphasis added.)[18]

PERB has recognized the continuing nature of the "course of negotiations" and has allowed the presentation of proposals to a

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[18]Similarly, rule 7.5, concerning arbitration, also contemplates the continuing nature of negotiations. Subrule 7.5(7) provides, in relevant part, that "[t]he parties may continue to bargain on the impasse items before the arbitrator or arbitration panel until the arbitrator or arbitration panel announces its decision. Should the parties reach agreement on an impasse item, they shall immediately report their agreement to the arbitrator or arbitration panel."

fact finder which were not offered until after mediation. In City of Ames, 78 PERB 1212, the parties had bargained, reached impasse and unsuccessfully mediated. On the date scheduled for the exchange of fact-finding proposals, but prior to their actual exchange, the employer made new offers on four impasse items which had never before been placed before the employee organization and which represented substantial movement from what had previously been the employer's bargaining position. Then, minutes later, the parties exchanged their fact-finding proposals, the employer's proposal reflecting the new positions it had assumed minutes before. PERB found no violation of subrule 7.4(3) by the employer. Since there was no violation of subrule 7.4(3), the case stands in part for the proposition that even post-mediation offers are to be considered as being made in the course of negotiations.

The course of negotiations has thus been recognized as a continuing process which is not necessarily ended when impasse is reached. So understood, it seems apparent that the §20.3(10) definition of "impasse" as the failure of parties to reach agreement in the course of negotiations necessarily refers to the course that negotiations have taken up to that point, but does not prohibit that course from continuing.

The rejection of the Association's premise that "the course of negotiations ends where impasse begins" does not, however, directly answer the question of whether offers made during mediation are made in the course of negotiations, for it still could be argued that the course of negotiations is somehow suspended by the

appearance of the mediator, but is subject to being resumed upon the mediator's departure.

Neither reason nor PERB authority supports such a proposition, however. Although the parties dispute its value in resolving the present case, I find PERB's decision in Dallas County, 82 PERB 2176, to be persuasive, if not controlling, on the question of whether offers made during mediation are to be considered as having been made in the course of negotiations.

In Dallas County, the employee organization had been seeking a 10% wage increase with a COLA provision during its pre-mediation bargaining. At mediation, with the parties in separate caucuses, the union made new wage proposals through the mediator which did not include the COLA, but which were still rejected by the employer. The new proposals were also conveyed directly by the employee organization's chief negotiator to the employer's representative. The parties had entered into an independent impasse procedure which excluded fact-finding, and when the employee organization's wage proposal which omitted a COLA was presented to the arbitrator, the employer filed a prohibited practice complaint alleging that it had not been offered the employee organization's arbitration proposal. PERB concluded that no prohibited practice had occurred because "the . . . offer was made by [the employee organization's representative] both to the federal mediator and directly to [the employer's representative] in the course of those negotiations." (Emphasis added).

Although factual dissimilarities clearly exist between Dallas

County and the instant case, Dallas County nonetheless supports the conclusion that offers made by a party at mediation, even those which are communicated through the mediator, are made in the course of negotiations. If an offer of a party conveyed through a mediator while the parties are in separate caucuses is one made in the course of negotiations, I perceive no reason why an offer made during a joint session at which both parties are present, as in the instant case, is not also one which is made in the course of negotiations.

To accept a proposition that offers made during mediation are not "in the course of negotiations" and thus may not be carried forward into fact-finding and arbitration would create an absurd result in cases where mediation was successful in accomplishing movement in the parties' respective positions, but nonetheless failed to bring about an agreement. If either or both parties moved toward settlement during mediation, but could not take their new positions into fact-finding or arbitration, a situation would be created where either the neutral would not be presented with the parties' true positions or where the parties would need to conduct an additional bargaining session, after the conclusion of the mediation, so that each could reiterate the unacceptable offers they had made at mediation so as to bring their already-known and offered positions within "the course of negotiations".

I do not believe that the Act requires such a charade or the adoption of the restricted view of "negotiations" which is advanced by the Association. The purposes of subrule 7.4(3) are twofold:

(1) to add stability to the fact-finding process by preventing surprise at the fact-finding hearing and (2) to encourage the parties to negotiate rather than litigate their differences, by insuring that every position to be presented to the fact finder has been previously offered.[19] Certainly the same purposes, only in the arbitration context, underlie the subrule 7.5(4)(a) requirement that a party's position before the arbitrator must have been previously offered to the other party. Neither of these goals is undermined by considering offers during mediation as being made during the course of negotiations.

This is not to suggest that parties should withhold known flexibility in their positions until mediation, for harmonious and cooperative relationships between public employers and the employee organizations representing their employees are certainly promoted by resolving divergent bargaining positions at the earliest opportunity. However, mediation is a part of the statutory scheme, and may produce a secondary benefit of narrowing the parties' differences even when the ultimate goal of settlement is not attained. A construction of the Act and of PERB's rules which affectively nullifies that benefit was not, I believe, intended by either the legislature or PERB when the Act and the rules were drafted.

I conclude that offers made by parties during mediation are made "in the course of negotiations" within the meaning of subrules 7.4(3) and 7.5(4)(a).

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[19]Eastern Iowa Community College, 77 PERB 973.

The fact remains, however, that the Association has established a violation of subrule 7.4(3) by the District, although not the "failure to previously offer" violation it sought to prove.

As previously quoted, subrule 7.4(3) directs that "[t]he parties shall exchange copies of all proposals to be presented to the fact finder at least five (5) days prior to the commencement of the fact-finding hearing . . . ." (Emphasis added). The record is clear that the fact-finding proposal which Wehr delivered to James on February 2, 1990, did not include a copy of the District's RIF proposal which was presented to the fact finder, but instead merely described the District's position as "[i]mprove the staff reduction article". The District's failure to attach a copy of its proposed "improvement", or to at least incorporate its previously-delivered proposal by written reference, I believe, constitutes a violation of subrule 7.4(3). The question is whether this violation constitutes a prohibited practice.

No authority has been cited, nor have I located any, which indicates that every violation of PERB rules constitutes a prohibited practice. Although subrule 7.4(3) has been the subject of a number of prohibited practice cases, they all appear to have dealt with either the timing of the exchange of proposals or with the "failure to previously offer" issue which I have resolved adversely to the Association. The issue of whether the failure to provide copies of previously-offered proposals itself constitutes a prohibited practice has apparently not been decided.

The Association's complaint concerning the District's fact-

finding conduct (No. 4176) alleges violations of the District's duty to negotiate in good faith and to participate in good faith in impasse procedures. Determinations concerning the presence or absence of good faith focus on the alleged wrongdoer's intentions, motives or state of mind:

> The ultimate decision as to whether a party has conducted its negotiations in good faith "involves a finding of motive or state of mind which can only be inferred from circumstantial evidence." The presence or absence of this motive or state of mind must be discerned from the record and can be inferred from the totality of the party's conduct. (Citations omitted.)[20]

An examination of the totality of the District's conduct relating to its subrule 7.4(3) violation is complicated by the diametrically-opposed testimony concerning what transpired when the District's fact-finding proposal was delivered to the Association. If James' testimony is credited, the Association was understandably surprised at fact-finding by what proved to be the District's position.[21] If this surprise was caused due to a motive or intention of the District to frustrate bargaining or fact-finding, or to gain an unfair advantage, not only was one of the purposes of subrule 7.4(3) frustrated, but a prohibited practice also occurred.

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[20]See, e.g., Charles City Community School District, 77 H.O. 680 & 783, and cases cited therein.

[21]Although the Association has failed to show that the District's fact-finding position on the RIF issue had not been offered during the course of the parties' negotiations, it is clear that the "improve the staff reduction article" language employed by the District in its fact-finding proposal, standing alone, did nothing to advise the Association of which of the two positions the District could legally assume at fact-finding it had in fact chosen.

On the other hand, if Wehr's recollection of the event is accepted, no surprise on the Association's part was justified, for in Wehr's version he clearly advised James what the District intended by its use of the ambiguous "improve the staff reduction article" language. In that case, we would be dealing with nothing more than a technical violation of subrule 7.4(3) which frustrated neither of the subrule's purposes, was not prompted by a bad faith motive or intention and provided the District with no real advantage at fact-finding.

From my examination of the record and my observation of the witnesses' demeanors, I cannot conclude that the evidence preponderates in favor of the Association's version of what transpired when the District's fact-finding proposal was delivered.[22] Although it thus seems clear that, at a minimum, the District's rule violation was the result of ignorance or carelessness, I cannot conclude that it has been shown to have been the product of a state of mind which would rise to the level of bad faith within the meaning of the Act so as to constitute a prohibited practice.[23]

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[22]Nor do I conclude, however, that the evidence preponderates in favor of the District's version. Neither party mustered what I view as a successful attack upon the credibility of the other's witness to the event, and neither witness is inherently unworthy of belief.

[23]Even were I to conclude otherwise, and find a violation of the District's duty to bargain and engage in impasse procedures in good faith, such would not produce the result (insertion of the Association's RIF proposal into the parties' contract, or alternatively, a return to arbitration with the District limited to its initial RIF proposal) sought by the Association. Those remedies would be considered only had the Association established

In summary, I conclude that the Association has failed to establish that the District's fact-finding position and final offer for arbitration on the impasse item of staff reduction was not offered to the Association during the course of negotiations. I also conclude that the Association has failed to establish that the District's subrule 7.4(3) violation constituted a refusal by the District to bargain or engage in impasse procedures in good faith. Consequently, I enter the following proposed

ORDER

IT IS THEREFORE ORDERED that the complaints filed herein by the Albia Education Association be and are hereby DISMISSED.

DATED at Des Moines, Iowa, this 11th day of March, 1991.

Jan V. Berry,
Administrative Law Judge

(Footnote 23, continued)
that the District's RIF position at fact-finding and arbitration had never been offered during the course of negotiations.

A prohibited practice found as a result of the District's failure to provide the Association with a copy of its RIF proposal for fact-finding would likely result in nothing more than a cease and desist order and the posting of a notice to employees advising them of the District's violation since the District's omission of its specific proposal was not repeated at the arbitration stage and since the Association, despite its claimed surprise, prevailed on the RIF issue at fact-finding. Thus, even had the Association prevailed on this prong of its claim, it could not have shown any injury warranting relief of the type it seeks.